facilities at discriminatory levels. *Id.* at ¶ 65-72. This conduct reinforces the BOCs' propensity to abuse their market power.

New abuses continue to emerge in other areas where BOCs are trying to compete with service providers, demonstrating that BOCs will continue to use their bottleneck unless the Commission takes decisive action. Most recently, Pacific Bell has begun a direct mail marketing campaign targeting telephone subscribers who use other carriers for intraLATA toll service in California. Pacific has chosen the customers targeted for this campaign based on its internal records of which customers are using other carriers.[19] Using this information to target its marketing efforts is a plain abuse of those customers' CPNI, and has obvious anticompetitive implications. Again, Pacific Bell, like the other BOCs, has access to this information only because it is the sole provider of local telephone service, with control over essential facilities that both its subscribers and competing interexchange carriers must use. With separate subsidiaries in place, this kind of abuse would be harder to accomplish and easier to identify. This is precisely the kind of abuse that cannot be addressed by nonstructural safeguards and can best be addressed by structural separation.[20]

19/ The California Public Utilities Commission has authorized intraLATA toll competition, but defaults all traffic to the local exchange carrier unless a customer affirmatively dials the carrier identification code for another carrier. Thus, Pacific Bell can target customers by determining which ones dialed calls using another carrier's carrier identification code. Moreover, this is the only way that Pacific Bell can identify specific subscribers who are using other carriers for intraLATA toll calls.

20/ This also demonstrates that the best "bright line" test for whether a service should be subject to structural separation is whether the service is a competitive service. Enhanced services are an example of competitive services, but there are many others. *See Comments of Cox Enterprises, Inc.*, CC Docket No. 94-1, filed April 17, 1995; *Petition of Cox*

(continued...)

The ultimate BOC rejoinder to these facts is to assert that none of these concerns are serious because the Commission has not been flooded with complaints about BOC behavior. *See, e.g.*, Comments of NYNEX at 3. In fact, Cox has complained about BOC actions, most notably in the MemoryCall case. Moreover, most of the scrutiny of BOC behavior has occurred at the state level, in such proceedings as the Georgia Commission's cross-subsidy proceeding, or through state audits of BOC behavior. This Commission does not normally involve itself in such state proceedings.

In addition, enhanced services providers do not expect complaints to the Commission to be effective. In the MemoryCall case, Cox and others reported BellSouth's blatant rules violations which had been confirmed in an adjudicatory proceeding before a competent regulatory authority, the Georgia Public Service Commission. Nevertheless, the Commission imposed no sanctions on BellSouth.[21] The absence of enforcement action on MemoryCall was all the more discouraging to enhanced services providers because the Commission specifically found that BellSouth had engaged in unhooking, a prohibited behavior, and still did not impose even a forfeiture. The inevitable effect of this laissez-faire attitude towards enforcement of the requirements of the *Computer III* rules was to discourage enhanced services providers from bringing their concerns to the Commission. Regardless of

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20/ (...continued)
Enterprises, Inc. to Deny or to Condition License Grant, File No. 00002-CW-L-95, filed May 12, 1995.

21/ Cox specifically requested sanctions, including forfeitures and voiding BellSouth's Comparably Efficient Interconnection Plan for voice messaging services. *See* Comments of Cox Enterprises, BellSouth Corporation Petition for Emergency Relief and Declaratory Ruling Preempting Actions of the Georgia Public Service Commission, CC Docket No. 91-757, filed July 22, 1991.

the merits of any case, small, often financially strapped enhanced services providers are not likely to spend the money and time necessary to prosecute a complaint if there is little likelihood of success.

Given the failures of nonstructural safeguards, and the risks that are part and parcel of BOC involvement in enhanced services, the only proper course for the Commission to follow at this time is to reintroduce the *Computer II* regime of structural separation. Structural separation is not a cure-all, but it greatly limits the potential for BOC misbehavior. If the BOC is required to regard its enhanced services operations (and other competitive businesses) from arms' length, it is less likely to imagine that it can get away with discrimination or other anticompetitive behavior.

Structural separation also effectively eliminates abuses (such as unhooking) that depend directly on using a BOC's status as the monopoly carrier. If the same personnel are not used to market both competitive and monopoly services, it becomes much more difficult to use information obtained as a result of being the monopoly provider to gain a competitive advantage. In the case of MemoryCall, unhooking simply would not have occurred if the person selling call forwarding was not simultaneously selling voice messaging.

Consequently, structural separation is a vital element of any regime to protect against the anticompetitive behavior of the BOCs in the enhanced services marketplace. As the pattern of BOC abuses in other areas shows, structural separation also should be applied to other BOC forays into competitive businesses.

IV. Conclusion

The record shows that nonstructural separation has not worked. The BOCs have the opportunity to engage in anticompetitive behavior because they control essential facilities, and will continue to do so for the foreseeable future. The BOCs not only have the opportunity to act anticompetitively, but have done so from the time nonstructural safeguards first replaced structural separation. In light of the BOCs' abuse of their market power, the Commission should reinstitute the regime of structural separation. Without it, independent enhanced services providers across the country will continue to suffer from anticompetitive BOC behavior. to the detriment of the public interest.

For all these reasons, Cox respectfully requests that the Commission adopt rules that are consistent with the positions taken herein.

Respectfully submitted,

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May 19, 1995

EXHIBIT 1

In the
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	)	Civil No. 82-0192 (HHG)

COMMENTS OF COX ENTERPRISES, INC. ON THE MOTION OF BELL ATLANTIC, BELLSOUTH, NYNEX AND SOUTHWESTERN <u>BELL TO VACATE THE DECREE</u>

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November 16, 1994

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COMMENTS OF COX ENTERPRISES, INC. ON THE MOTION OF BELL ATLANTIC, BELLSOUTH, NYNEX AND SOUTHWESTERN BELL TO VACATE THE DECREE

Cox Enterprises, Inc. ("Cox"), by its attorneys, respectfully submits its comments in opposition to the above-referenced request to vacate the Modification of Final Judgment.[1/]. These comments demonstrate that the Bell Operating Companies ("BOCs") consistently use their local exchange monopoly to disadvantage competitors and captive telephone ratepayers. Existing federal and state regulation have been inadequate to prevent such abuses. Consequently, until the BOCs are subject to effective local exchange competition, the Decree should remain in effect.

1/ United States v. Western Electric Co., 552 F.Supp. 131 (D.D.C. 1982) (the "Decree" or the "MFJ"), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

I. INTRODUCTION

The primary purpose underlying the Decree was to prevent the anti-competitive practices of the Bell System so that competition could develop in telecommunications markets. Today, competition exists in virtually all areas of the communications marketplace except for one: the local exchange market. The Decree was premised on the assumption that local exchange was a "natural" monopoly and that competition was not possible. Accordingly, to prevent the BOCs from leveraging their local exchange monopoly into competitive markets, the Decree provides that the BOCs may not participate in the closely-related markets for interexchange services and equipment manufacturing.

In the above-referenced motion (the "Motion to Vacate"), four of the seven BOCs argue that the Decree no longer is necessary to prevent anti-competitive behavior and that the public interest is not served by preventing BOCs from participating in the two forbidden markets. The facts do not bear out these claims. Time and again audits of the BOCs uncover continuing and substantial misconduct. As the Court of Appeals for the Ninth Circuit observed only weeks ago:

> [T]he BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anti-competitive behavior.[2]

2/ People of the State of California v. FCC, Case No. 92-70083, slip op. at 12766 (9th Cir. Oct. 18, 1994)

These comments demonstrate that the BOCs have both the incentive and the ability to cross-subsidize competitive services with revenues from regulated services and to use their bottleneck control over local exchange facilities to the detriment of their competitors. These abuses have occurred under existing regulation and federal and state regulators have not demonstrated that they are equipped or would be able to prevent similar abuses in the interexchange and equipment markets.

The ultimate solution to anti-competitive behavior by the BOCs is establishing full and fair competition in the local exchange market. Although the potential for such competition exists in the future, the local exchange market is not by any stretch of the imagination competitive today. Until local exchange competition develops, the Court must retain the Decree restrictions on BOC entry into interexchange and equipment manufacturing markets.

II. THE BELL OPERATING COMPANIES POSSESS A MONOPOLY IN THE LOCAL EXCHANGE MARKET

The Motion to Vacate is premised on the theory that the decree no longer is necessary because the local exchange market is not a "natural" monopoly. Motion at 55. While the Motion to Vacate demonstrates the potential for competition at some point in the future,[3] it utterly fails to demonstrate the presence of competition today. Due to legal,

3/ "[C]able systems are emerging as competitors to LECs." Motion to Vacate at 58; "Electric companies are testing new uses for the fiber optic networks that link their customers, and a few currently provide telephone services." Id. at 58 n.29; "Wireless service may soon compete directly with wireline calling." Id. at 59; "Looking only slightly to the future, these cable-CAP network are ideally suited to connect PCS radio transceivers and to tie PCS networks to interexchange carriers." Id. at 61 (emphasis added).

technological and economic barriers, the BOC monopoly in the local exchange is as strong as it was ten years ago. Accordingly, the Decree remains necessary to assure that the BOCs do not leverage their monopoly into other markets.

A. Legal Barriers to Entry

In the Motion to Vacate, the BOCs go to considerable lengths in attempting to convince this Court that they soon will be overwhelmed by competition. Noticeably absent from this rhetorical barrage is any mention of the fact that it is unlawful to provide competitive local exchange service in over 40 states. For example, the Code of Virginia states:

> No certificate shall be granted to an applicant proposing to furnish local exchange telephone service in the territory of another certificate holder unless and until it shall be proved to the satisfaction of the [Corporation] Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience.

Va. Code § 56-265.4:4.

No other companies in this country are permitted to operate with such a significant amount of revenue protected by law from competition. While several states are making strides towards encouraging forms of local competition, the picture of robust local competition painted by the BOCs is plainly contradicted by the facts of regulatory, technical and economic restrictions on competitive local exchange endeavors.

The general prohibition on local exchange competition that exists in most states affects competition in interstate markets as well. Until a competitive access provider

(CAP) can provide local exchange services, it is difficult to generate sufficient volume to justify investing in a switch. Therefore, while CAPs are permitted to compete for interstate switched access services, they have been successful (and then only to a degree) only in the market for special access (non-switched) services. Notwithstanding this limited success in the special access market, the entire CAP industry has captured less than one percent of the revenue of the $25 billion access market.[4/] The BOC assertion that a market is competitive when an entire industry is able to capture less than one percent of the market after competing for 10 years is ludicrous.

B. Technical Barriers to Entry

The Motion to Vacate asserts that cable television systems and wireless services may soon compete with existing local exchange networks. Today, however, there is not a single cable system or wireless network that effectively competes with an incumbent local exchange carrier.

Moreover, it likely will be years before these potential competitors develop networks that are functionally equivalent to the BOCs. The technological obstacles facing cable operators that seek to provide competitive local exchange service were capably described to the MFJ Court by Bell Atlantic earlier this year. In seeking a waiver for its proposed merger with Tele-Communications, Inc., Bell Atlantic told the Court:

4/ See, e.g., Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Comments of AT&T at 9 (filed May 9, 1994).

> Absent modifications, cable architecture is poorly suited to provide switched, two-way telephone services to individual customers.[5]

In addition to this fundamental architectural problem, Bell Atlantic told the Court that cable systems lack a number of capabilities that are essential to the provision of telephone service. Specifically, Bell Atlantic stated that cable systems lack: (1) the sophisticated switching systems necessary to route telephone traffic; (2) the specialized billing systems needed to handle multiple services and large volumes of individually metered transactions; and (3) the specialized Operations Support Systems to handle facilities provisioning, administration and maintenance, traffic management, service evaluation, and the planning and engineering associated with switched services. Oliver Affidavit at 4-5.

As to the ability of cable operators to compete by providing Personal Communications Services (PCS), Bell Atlantic relied on an affidavit of Dr. Richard Green, President and CEO of Cable Television Laboratories. According to Dr. Green:

> [T]he commercial reality is that cable's provision of personal communications services is neither certain or immediate . . . it is far from clear whether radio based systems will ultimately be able to compete with wired systems for the provision of ordinary local telephone services.[6]

None of the shortcomings outlined in the Bell Atlantic Motion is mentioned in the Motion to Vacate to which Bell Atlantic is a party. Either effective local exchange

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5/ Bell Atlantic's Request for an Expedited Waiver Relating to Out of Region Interexchange Services and Satellite Programming Transport ("Bell Atlantic Motion"), Affidavit of Brian D. Oliver ("Oliver Affidavit") at 4 (filed January 20, 1994).

6/ Oliver Affidavit at 6, citing Affidavit of Dr. Richard Green, submitted in Chesapeake and Potomac Telephone Company v. United States, 830 F. Supp. 909 (E.D. Va. 1993).

competition is uncertain from a technological perspective or it is not. Placed side-by-side, the Bell Atlantic Motion and the Motion to Vacate raise serious questions about Bell Atlantic's willingess to distort the truth to achieve desired ends.

C. Economic Barriers to Entry

Even if legal barriers to entry are removed tomorrow, it will be years before BOC competitors are able to overcome the economic barriers to competition that exist today. Those barriers include: (1) lack of regional reasonably priced interconnection; (2) BOC control over numbering resources; (3) lack of multi-state or regional ubiquity and name recognition.

1. Interconnection and Reciprocal Compensation

The FCC adopted rules in 1992 requiring the BOCs to provide expanded interconnection options to CAPs, IXCs and end users. The intent of the Commission's expanded interconnection rules was to give competitive choices to customers that were not located in areas served by competing networks.[7/]

Although the Commission's rules were adopted two years ago, the Commission has yet to find that the BOCs have tariffed expanded interconnection at reasonable rates.[8/] Among other deficiencies, the BOC tariffs attempted to load

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7/ Without expanded interconnection, a CAP can serve a customer only if its network goes to the customer's building. In many cases, CAPs are denied access to buildings served by the BOCs or are required to pay fees not imposed on the BOCs.

8/ "We find that the LECs have not demonstrated that their originally filed rates for (continued...)

extraordinary overhead costs into the interconnection rate. In many cases, BOCs proposed overhead loadings for expanded interconnection that exceeded the overhead reflected in rates for retail access services provided by the BOCs. Id. at 8359. Under such a tariffed pricing scheme, it is impossible for any CAP to serve IXC customers without losing money.[9/]

In addition to strategically pricing expanded interconnection options to make them economically unattractive to potential competitors, the BOCs vehmently opposed the imposition of exanded interconnection obligations, and sucessfully overturned on court review the FCC's requirement that BOCs provide physical interconnection within their end offices.[10/] These are not actions that should encourage either the Department or the MFJ court that the BOCs intend to permit competition to take any lasting root.

Interconnection will become an increasingly troublesome issue as CAPs and others seek to enter the local exchange market. To date, regulators in a few states have required competitive local exchange providers to negotiate reciprocal compensation arrangements with incumbent LECs.[11/] The potential for LEC abuse in this situation is tremendous. For the foreseeable future the LEC will terminate significantly more CAP calls than the CAP will terminate LEC calls, and therefore the LEC has every incentive to demand

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8/ (...continued)
expanded interconnection are just and reasonable in compliance with the Communications Act." Local Exchange Carrier Rates, Terms and Conditions for Expanded Interconnection for Special Access, First Report and Order, 8 FCC Rcd 8344, 8346 (1993).

9/ Despite these anti-competitive rates, the FCC's options for prescribing reasonable rates under its tariff review regulations have been woefully inadequate.

10/ Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

11/ New York Telephone, Case No. 92-C-0665 (N.Y. PSC Sept. 20, 1993).

an unreasonably high reciprocal compensation rate or to impose unreasonable terms and conditions. In this situation, CAPs that cannot provide local exchange service until mutual compensation agreements are reached with the LEC are essentially powerless to negotiate a reasonable rate. As discussed in greater detail in Section IV, similar concerns exist for potential entrants in the PCS market.

2. Numbering

Another substantial barrier to effective competition in the local exchange market is BOC control over numbering resources. There is no mechanism in place today that enables a customer to switch carriers while retaining its existing telephone number. Business customers often have invested heavily in their existing numbers (e.g., advertising and stationery) and a competing service provider will have to price its services at a rate that compensates the customer for loss of this investment. Residential customers are equally tied to their existing telephone numbers, for reasons that may be more psychological than economic. Until number portability is in place, and there is no timetable or current regulatory requirement for its implementation, the BOCs will have a tremendous strategic advantage over potential competitors.

In most states, BOCs possess an additional competitive advantage by virtue of their control over numbering resources. If a BOC competitor is successful in attracting new customers, it must purchase telephone numbers for those customers from the BOC. Although some states, such as New York, have required incumbents to make telephone numbers available on the same terms as they are used by the telephone company, this is the exception, not the rule. The ability of one competitor to impose costs on another competitor for a key resource is entirely inconsistent with the development of a competitive market.

3. Economies of Scale

An additional competitive advantage the BOCs possess solely by virtue of their monopoly in the local exchange market is their ubiquitous multi-state and regional presence. While there has been some consolidation in the cable industry recently, no cable operator serves a region anywhere as large as the contiguous multi-state regions served by the BOCs. The economies of scale that result from serving multi-state regions are unlikely to be duplicated in the near term by cable operators, who typically operate systems designed primarily to serve no more than a few communities. CAPs and other potential competitors also lack these economies of scale.

Not only do the regional BOCs serve huge territories, but they are required by state regulators to provide high quality services at low rates. While the BOCs continually complain about the "burden" of universal service, in fact this burden is a tremendous competitive advantage in terms of how the BOCs are perceived by customers. This is just one more example of how the BOCs pervasive monopoly presents a substantial economic barrier to entry.

D. Barriers to Entry in Southern California: An Example

The fallacy of the BOCs' assertion that they no longer are monopolists is demonstrated by looking at the market in southern California. Cox operates cable systems in San Diego, Bakersfield and Santa Barbara and it has agreed to purchase systems owned by

Times Mirror in Los Angeles. Under the standards outlined in the Motion to Vacate, southern California is a highly competitive telecommunications market and Pacific Bell will be unable to compete effectively with Cox unless the Decree is eliminated.

The portrait of the marketplace presented in the Motion to Vacate bears no resemblance to today's reality. First, there are state certification barriers to the institution of wired service competition.[12] Second, while Pacific Bell has a fully functioning local exchange network in place, Cox must spend many millions of dollars before it has a network that is technically capable of providing wired local exchange service. Even when the Cox network can serve telephony customers and has succeeded in clustering its cable operations beyond anyone's wildest imagination, it will not have the geographic ubiquity or the scope of Pacific Bell's network, nor will Cox have the name recognition of the incumbent.

Moreover, once a telephony capable network is in place, Cox will bear a heavy burden convincing customers to leave Pacific Bell. For customers located on the Cox network (e.g., existing cable customers), Cox must price its services at a rate that is low enough to: (1) compensate customers for giving up their existing telephone numbers; and (2) compete with Pacific Bell's allegedly "subsidized" rate.[13] For customers not served

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12/ Given the time it has taken the state of California to resolve the issues arising from the institution of intraLATA toll competition due in no small part to the dilatory tactics of PacBell, Cox anticipates a substantial regulatory delay while California develops policies to deal with competitive local exchange providers.

13/ Pacific Bell claims that its local exchange rates are artificially low because "implicit subsidies flow from low-cost areas to high-cost areas and from high margin services to below-cost services. Amendment of Part 36 of the Commission's Rules, CC Docket No. 80-286, Comments of Pacific Bell at 6 (filed October 28, 1994). However, a recent audit of (continued...)

directly by the Cox network, Cox must bear the additional cost of using Pacific Bell's local loop facilities or building its own facilities to the customer. Because the financial viability of this enterprise also depends on the availability fair and reasonable interconnection rates and terms with PacBell, Cox anticipates that PacBell will, as in the expanded interconnection arena, stonewall competitors by filing strategically priced interconnection rates. Given these substantial obstacles, the ability of Cox to offer truly competitive local exchange service is far from certain.

E. Comparison of Entry Barriers in the Local Exchange and Interexchange Markets.

The deficiencies in the BOCs' argument that the local exchange market is competitive are readily apparent when judged under the standards the BOCs use to measure competition in the interexchange market. According to the BOCs, the interexchange market is not competitive even though three IXCs operate nationwide fiber optic networks and hundreds of other carriers offer services to end users.[14] The BOCs cite the high cost of fiber optic networks as a significant barrier to further entry in the interexchange market. Judged by these standards, the assertion that the local exchange market is competitive is

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13/ (...continued)
Pacific Bell demonstrates that the opposite may be true, i.e., that residential services actually subsidize the development of new competitive services. An Audit of the Affiliate Interests of the Pacific Telesis Group, National Association of Regulatory Utility Commissioners (July 1994) ("NARUC Audit").

14/ See Long Distance Carriers and Their Code Assignments, Industry Analysis Division, Federal Communications Commission, released September 27, 1994.

nonsense. Virtually every local exchange market in the country is characterized by a single ubiquitous network. There are few, if any, markets where there exists a second network and surely none with three networks each with the scope and the capability of the LEC local network.

The BOCs also assert the interexchange market is not competitive because MCI and Sprint forever will face higher marginal costs than AT&T and that they never will gain additional market share. Motion to Vacate at 70. Moreover, the BOCs claim this situation is exacerbated by the fact that customers still perceive that AT&T possesses superior technical abilities and a more ubiquitous network.[15] These same problems, however, will face potential entrants into the local exchange market. As stated above, CAPs have been ineffective in the switched access market in part because they lack the economies of scale possessed by the BOCs and other LECs, who handle virtually all of the switched access traffic of the IXCs.

In short, judged under any standard, competition in the local exchange market does not exist today, nor is it likely to develop in the near future.

15/ Motion to Vacate at 70-71. The BOC's characterization of the interexchange market raises substantial questions regarding claims that BOC entry into this market will benefit consumers. The BOCs will be at a tremendous disadvantage because they do not have nationwide fiber networks in place like AT&T, MCI and Sprint. Furthermore, because well over 90% of interexchange traffic originates and terminates on LEC networks, entry into the interexchange market should have little effect on the BOCs' marginal costs. Thus, absent cross-subsidization, it is unclear how the BOCs would be any more effective than MCI and Sprint in reducing interexchange rates.

III. EXPERIENCE SHOWS THAT REGULATORY SAFEGUARDS ARE INSUFFICIENT TO PROTECT AGAINST BOC ABUSES OF MONOPOLY POWER IN THE MARKETS IN WHICH THEY NOW PARTICIPATE.

One of the bulwarks of the BOC argument for lifting the remaining MFJ restrictions is that existing regulation is sufficient to protect against any abuses of monopoly power. The Motion to Vacate proudly points to BOC participation in markets adjacent to the local exchange, claiming that this BOC market participation proves that monopoly local exchange power is not being abused. Experience shows that the opposite is true, and that BOCs use their local exchange monopoly with impunity to advantage their own non-local exchange operations, especially in information services. If regulators are unable to stem these abuses in the information services marketplace, it is highly unlikely they would have any more success in the much larger interexchange and equipment marketplaces, where cross-subsidy and other abuses will be much harder to prevent or detect.

A. BOCs Have Abused Their Existing Monopolies by Discriminating Against ISP Competitors.

One of the most effective ways for a BOC to quash competition in information services is to discriminate against non-affiliated information services providers ("ISPs"). Since the removal of the original MFJ information services restriction, BOCs have discriminated against non-affiliated ISPs in a variety of ways. Typically, the BOCs do not discriminate by charging themselves one price for a service and charging outsiders a different price. Rather, the BOCs use somewhat more subtle mechanisms, such as pricing services they use at relatively low levels, while pricing services used by competitors at relatively high levels. BOCs also use their control over the local exchange network to delay or prevent the introduction of services useful to competitors and to design services so that they will be more useful to the BOC than to non-affiliated ISPs.

1. ONA Price Discrimination

Price discrimination is a very efficient mechanism to aid the BOC's information services while disadvantaging other ISPs. Because tariffing requirements make it difficult to engage in discrimination in the pricing of specific services, BOCs have turned to other approaches, notably pricing different services based on who uses them.

For instance, when BellSouth proposed its first Open Network Architecture tariff in Georgia, it planned to offer ten non-access services. Of the ten services, BellSouth uses four services, and non-BellSouth ISPs use six. According to data provided to the Georgia Public Service Commission by BellSouth, the four services used by BellSouth have average profit margins of 22.23 percent, while the six services not used by BellSouth have average margins of 162.1 percent. The services used by BellSouth had four of the five lowest margins, while the services used by other ISPs had only one of the five lowest margins and the five highest margins.[16] The only rationale presented by BellSouth to justify these disparities was that it had set rates based on "market" considerations.

In the same proceeding, BellSouth also proposed rates that discriminated in favor of its own basic service offerings. BellSouth's ONA tariff proposed offering four different number identification services. Of the four, the one with the lowest price and the

16/ The services and profit margins for each are shown in Exhibit 1.

lowest profit margin also was compatible only with BellSouth's digital Centrex service. BellSouth customers with PBXs, on the other hand, are required to use services that are priced 150 to 300 percent higher, and with profit margins that are 49 to 140 percent higher than the Centrex version of the service. This disparate pricing plainly provides an advantage to Centrex service in BellSouth's competition with PBX vendors, because the cost of calling number identification now is significantly higher for PBX users than for Centrex customers.

2. Refusal to Provide Services to Competitors

Another way that BOCs create discriminatory advantages for themselves is in the timing of service availability and the design of services. BOCs choose not to provide services until they want to use them, not when those services are requested by ISP competitors. Similarly, BOCs offer services that they can use, often without any regard for the needs of independent ISPs.

The discrimination described above took place in Georgia when BellSouth decided to enter the voice messaging business. For several years, voice messaging providers requested a service known as call forwarding variable, which permits calls to be forwarded to another number automatically after a certain number of rings or if the original number is busy. Call forwarding variable is an important, widely available service for voice messaging because it makes voice messaging much more convenient for end users. Without this service, end users are required to forward their telephones manually and callers cannot leave messages when the end user's line is busy. BellSouth would not provide this service to competitors, however, until its own MemoryCall voice messaging service became available.[17] Thus, BellSouth effectively limited the growth of other voice messaging service providers by denying them an important telephone service. This action made it much easier for BellSouth to enter the voice messaging market in Georgia and much harder for existing voice messaging services to compete with BellSouth. Georgia MemoryCall Order at 31-34.

BellSouth also used its position as the local telephone company to offer services that benefitted its own information services operations. MemoryCall used a service known as Simplified Message Desk Interface ("SMDI") to provide voice messaging. As implemented in Georgia, SMDI was incompatible with the technology used by almost all independent voice messaging providers. Id. at 28-30. Thus, BellSouth offered a service that, effectively, was available only to its own voice messaging operations, creating significant advantages in the voice messaging marketplace. Id.

3. Refusal to Provide N11 Numbers

BellSouth is not the only BOC that has used its position as the only local exchange carrier to its advantage in the marketplace. In another area, the use of "N11" numbers, Cox has found that BOCs have engaged in discriminatory conduct.[18]

17/ This and other anti-competitive aspects of BellSouth's MemoryCall offering are described in the Georgia Public Service Commission's order on MemoryCall (the "Georgia MemoryCall Order"), a copy of which is attached hereto as Exhibit 2.

18/ N11 numbers are three digit telephone numbers, which have a number from two through nine as the first digit and which end in "11". The most common uses of these numbers are 911 for emergency services and 411 for directory assistance.